IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.870 OF 1998

IN

SUIT NO.1866 OF 1980

Bank of India. ...Appellant.

vs.

1.B.C.Mody Export Pvt.Ltd. & another. ...Respondents.

Mrs.S.Srikrishna with Ms.V.Tiwari i/b. F.Z.B.Associates, for Appellant.

Mr.F.Dubhash i/b. Maneksha & Sethana, for Respondents.

CORAM: D.K.DESHMUKH &
J.H.BHATIA, JJ.

DATED: 18th July,2007.

P.C.:-

1. This is an appeal filed by the original defendant no.1 in Suit no.1866 of 1980. In that suit The Commercial Bank of Africa Ltd. was defendant no.2. The defendant no.2 did not file written statement inspite of being served. Therefore, by order dated 10.6.1997 the Court passed decree against defendants no.2, in the absence of written statement accepting the statements in the plaint at face value. Now the suit remained only against defendant no.1. On that date viz. 10.6.1997, the plaintiff tendered affidavit of documents. The Court directed the first defendant to file affidavit of documents within two weeks. The parties were directed to complete inspection and it was further observed by the Court that if the defendant no.1 fails to file affidavit of documents within the time fixed

by the Court, the Court will proceed to pass appropriate order under Order 11 Rule 21 of the Civil Procedure Code. The first defendant did not file affidavit of documents within the time allowed. Therefore, by order dated 27.11.1997 the Court directed that the written statement of the defendant no.1 is struck off the record and the matter was adjourned. On 18.12.1997, in the absence of written statement by defendant no.1, the Court passed decree against the defendant no.1 also. It is these three orders which are impugned in this appeal.

2. It transpires that on the same cause of action and in relation to the same transaction between the same parties, the defendant no.1 Bank of India had filed suit no.1594 of 1985 seeking money decree against the plaintiffs in this suit. That suit was decided after trial by the learned Single Judge of this Court by judgment dated 13.7.2006 and the learned Single Judge decreed

the suit in favour of the present defendant no.1 who was plaintiff in that suit. The present plaintiffs who were defendants in that suit have filed an appeal against that judgment and decree which is pending.

3. The learned Counsel appearing for the appellant relying on the provisions of Order 11 of Civil Procedure Code and the judgment of the Division Bench of Allahabad High Court in the case of “Abdul Aziz and another Vs. A.Raj Chhabra, AIR 1968 Allahabad 119” submits that the exparte decree passed against the appellant is liable to be set aside. She also submits that because of the judgment of the learned Single Judge in the suit filed by the defendant no.1, the defendant no.1 is entitled to have an opportunity to contest this suit on merit.

4. We have heard the learned Counsel appearing for plaintiffs. It does appear that

there is considerable merit in the submission made on behalf of the appellant that the learned Single Judge could not have struck off the written statement of the appellant without there being any application made by the plaintiff and without granting an opportunity of being heard to the appellant. In our opinion, the fact that in relation to the same transaction there is a decree passed after contest by the learned Single Judge of this Court, makes the exparte decree passed in the suit which is impugned in this appeal liable to be set aside. In our opinion, the right thing would have been to hear these two suits together because it is common ground before us that the subject matter of both the suits is the same and the parties to both the suits are also the same. In our opinion, therefore, taking overall view of the matter, the following order would meet the ends of justice:-

(i) The orders impugned in the appeal are

set aside. The written statement of the present appellant is restored to record. The suit is also restored. However, it is directed that the trial of the suit shall remain stayed pending the decision of the appeal which is filed by the appellant against the judgment dated 13.7.2006 in suit no.1594 of 1985.

(ii) The appellant shall be at liberty to approach the learned Single Judge for trial of this suit after the appeal filed by the plaintiffs is decided.

(D.K.DESHMUKH, J.)

(J.H.BHATIA,J.)